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82-1654
No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

The principle question presented for review is:

Whether the Court of Appeals correctly held that Jane Doe, as Plaintiff, was a "prevailing party" for purposes of attorney's fees under 42 U.S.C. §1988 in light of special circumstances presented by this case.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,

Petitioners

V.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Bailey Marshall, Director of the University Interscholastic League, and member of the Executive Committee, individually, and in his official capacity, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on January 6, 1983.

PARTIES TO THE PROCEEDING

In the District Court below, Jane Doe, on behalf of her minor son, John Doe, as Plaintiff, brought suit against:

Bailey Marshall, Director of the University Interscholastic League, and member of the ex-

ecutive committee, individually and in his official capacity;

William Farney, State Athletic Director of the University Interscholastic League, and member of the Executive Committee, individually and in his official capacity;

Thomas M. Hatfield, Chairperson of the University Interscholastic League Legislative Council and member of the Executive Committee, individually and in his official capacity;

Other members of the University Interscholastic League Executive Committee: Lynn F. Anderson, Lynn W. McCraw, Betty Thompson, Clifton Van Dyke, Jesse J. Villareal, and June S. Williams, each individually and in his official capacity;

Dr. Emmett McKenzie, Jr., Superintendent of Alvin Independent School District, in his official capacity.

All of the individuals serve in the capacities described except Clifton Van Dyke and June S. Williams, who no longer serve as members of the University Interscholastic League Executive Committee, and Thomas M. Hatfield who now serves as Chairperson of the Executive Committee. However, Bailey Marshall as Director of the Univeristy Interscholastic League is the real party in interest and no defect as to parties is alleged by Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals, for which review is sought, is reported at 694 F.2d 1038. A copy of the opinion is included in the Appendix to this Petition. The District Court order is not reported but is included in the Appendix together with the District Court's judgment. The earlier opinion and judgment of the Fifth Circuit are also set out in the Appendix together with the District Court's earlier opinion (entered as "Reasons for Granting Preliminary Injunction").

JURISDICTION

The opinion of the Court of Appeals was entered on January 6, 1983. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes in question in this case are Section 504 of the Rehabilitation Act of 1973, codified as 29 U.S.C. §794; 42 U.S.C.A. §1988; and Art. VIII, Secs. 13 and 14 of the Constitution of the University Interscholastic League (UIL) for 1978-1979.

Section 504 of the Rehabilitation Act of 1973, originally provided:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(6) (29 U.S.C. §706[6]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

Section 504 was amended in 1978 to provide for nondiscrimination by federal agencies, and after amendment now reads:

> "No otherwise qualified handicapped individual in the United States, as defined in section 7(7) (29 U.S.C. §706[7]), shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees."

The Attorneys' Fees Act, 42 U.S.C.A. §1988, provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as

> modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

Article VIII, Section 13 of the Constitution of the University Interscholastic League (UIL) for 1978-1979, provides as follows:

> Sec. 13. *Changing Schools*—A pupil changing schools is not eligible in League contests, until he has been in attendance at the school to which he changes for one year if: a) his parents reside outside the school district; or 2) his parents reside outside the school attendance zone in school districts with more than one high school.

Article VIII, Section 14 of said Constitution provides in relevant part (with inapplicable exceptions omitted) as follows:

> Sec. 14. *One Year Rule*—A pupil who has represented a high school (other than his present school) in either football or basketball is in-

eligible, only in the sport or sports (football or basketball) in which he participated, for one calendar year in a school to which he changes.

STATEMENT OF THE CASE

Jane Doe filed suit anonymously on behalf of her son, John Doe, an emotionally handicapped minor, against officials of the Texas University Interscholastic League in their individual and official capacities. The suit alleged that the "no transfer" rule imposed by UIL on all Texas public high school students violated 29 U.S.C. §794 (hereinafter referred to as Section 504) which prohibits discrimination against handicapped persons by those operating any program or activity receiving federal financial assistance. Jane Doe sought a preliminary injuction to allow her son to play football in the school district where he was residing with his grandmother after psychiatric evaluations and a therapist recommended he be temporarily removed from his parents' residence.

The immediate transfer of Jane Doe's son to another school district, coupled with his request to play football with that district's football team, violated the UIL's rules which required one year of residency in a school district prior to a student being eligible to participate in high school athletics. Jane Doe did not seek to invalidate the UIL "no transfer" rule or to test its constitutionality. She merely alleged the District Court had jurisdiction to grant her a private cause of action to show that the effect of the UIL rule violated Section 504 of the federal law and its implementing regulations under 45 C.F.R. 84.36, *et seq.* She alleged that Section 504 and its regulations required the UIL to make a reasonable accommodation to the needs of her "handicapped" son since he was attempting to participate in a program or activity which received federal financial assistance.

The UIL filed a motion to dismiss arguing, *inter alia*, that the DistrictCourt had no jurisdiction to hear a private individual's complaint which alleged violations of Section 504 and, alternatively, that Jane Doe had to exhaust her administrative remedies prior to bring suit. Hearing was set by the District Court to show cause why a preliminary injunction should not issue to restrain the UIL from barring John Doe from playing football (only) in the school district to which he had transferred. At the hearing, the UIL denied that it was a recipient of federal financial assistance for regulatory purposes under Section 504. It further argued that Jane Doe had not made the prerequisite showing that the UIL had received such funds. Further more, Jane Doe did not show that her minor son, because of the UIL's treatment of his case, was subjected to treatment any different from that of other individuals falling under the provisions of the UIL's "no transfer" rule. The District Court, however, granted a preliminary injunction enjoining the UIL from interfering with or preventing the minor John Doe from full participation in the football program at his new school. While the court specifically found that John Doe was a "handicapped" individual within the provisions of Section 504 and that Section 504 provided a private cause of action to him, it made no finding that the UIL was a recipient of federal financial assistance or that federal money for athletics had been directly or indirectly received by the UIL.

The UIL filed notice of appeal and costs bond in the amount of $250.00. On the same day a notice of appeal was filed, the UIL filed an application for stay pending appeal. Stay was denied by the District Court.

During the pendency of the appeal, John Doe graduated from high school after having continued to play football throughout his senior year. In supplemental briefs prior to oral argument, at oral argument, and

in post-submission memorandums, attorneys for both the UIL and Jane Doe agreed that the case on appeal was not moot. Both parties argued that a decision was needed on the substantive issues at bar so that a proper determination could be made of whether or not Jane Doe was a "prevailing party" for purposes of attorney's fees. It was further agreed by the parties that, without a determination of the validity of the District Court's decision, it would be illogical and unfair for one litigant to subject another to an assessment of attorney's fees as a result of a wrongly decided preliminary order.

The Court of Appeals vacated the preliminary injunction and held that the case was moot because John Doe had graduated from high school. The court refused to determine the issues raised by the mooted suit and instead held that, because she had obtained beneficial injunctive relief in the District Court, Jane Doe was a prevailing party for purposes of 42 U.S.C. §1988 and entitled to "appropriate attorney's fees."[1] The UIL then petitioned this Court for writ of certiorari. The Court denied the petition, with dissent, in May, 1981. Hearing was then held before the District Court for a determination of appropriate attorney's fees. The District Court awarded attorney's fees in the amount of $8,625.00. Appeal of the award was made to the Court of Appeals which subsequently held that circumstances were not present in the case which would inhibit the court from applying the "law-of-the-case" principle enunciated in *Morrow v. Dillard,* 580 F.2d 1284 (5th Cir. 1978).

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1. The Court of Appeals' earlier decision in this case was reported as *Doe v. Marshall,* 622 F.2d 118 (5th Cir. 1980), *cert. denied,* 451 U.S. 993 (1981).

REASON FOR GRANTING THE WRIT

From its inception this case has raised serious jurisdictional issues under Section 504 and 42 U.S.C. §1983. Specifically, the district court did not decide whether the UIL was a "recipient" of federal financial assistance so as to trigger the regulatory provisions of Section 504 or whether any discriminatory treatment was administered to John Doe in the UIL's consideration of his case. Certainly these threshold questions should have been resolved by the courts before it was determined that Jane Doe was, in fact and law, a "prevailing party" for the purposes of attorney's fees. Instead, the mere entry of preliminary injunctive relief for Jane Doe—whether it was legally permissible or not—has now allowed her to recover $8,625.00 in attorney's fees.

The question of whether such action should allow an award of attorney's fees to stand against individuals who are officials of the State of Texas is of sufficient importance to merit resolution by this Court.

1. The Court of Appeal's decision is in conflict with the Court's decision in *Hanrahan v. Hampton*, 466 U.S. 754 (1980); *Doe v. Busbee*, 684 F.2d 1375 (5th Cir. 1982); and *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980).

This Court has stated that Congress has authorized an attorney's fee award "to a party who has established his *entitlement* to some relief on the merits of his claim." *Hanrahan v. Hampton, supra* at 757. (emphasis added). In other words, a party prevails in a lawsuit when he establishes a legal entitlement to what he seeks, not when what he seeks is actually delivered. *Cf. Knighton v. Watkins*, 616 F.2d 795, 799 (5th Cir. 1980).

The central question in this case has always been whether or not Jane Doe was legally entitled to bring her cause of action against the UIL. While it is true that Doe sought to have her son play football at the school of his choice and subsequently received injunctive relief which allowed him to play, the relief she obtained was only preliminary and should not have been considered a win on the merits. See *Hanrahan, supra; Smith v. University of North Carolina, supra; Oshiver v. Philadelphia Court of Common Pleas,* 497 F.Supp. 416 (E.D. Pa. 1980). The preliminary relief granted in the case at bar, although substantive, never determined the actual merits of Jane Doe's claims. No finding was made that John Doe was discriminated against by the UIL, or that he was treated differently from any student falling under the provisions of the UIL's rules. The record itself shows conclusively that John Doe was *not* treated any differently under the UIL rule because of his handicap; instead, the suit sought special treatment for him—exclusion from the provisions of a rule which, heretofore, had been applied equally to every student regardless of their personal circumstances. See *Fortson v. Dorsey,* 379 U.S. 433 (1965).

More importantly, the record shows that the District Court failed to make a crucial jurisdictional finding under Section 504 prior to entering injunctive relief for Jane Doe: the court failed to find that the UIL was a recipient of federal financial assistance.

In order for Jane Doe to have established any right under Section 504 (and, therefore, under Section 1983), she had to show that the UIL conducted a "program or activity receiving federal financial assistance," 29 U.S.C. §794 (Section 504 herein), or that the UIL was a public entity"... to which federal financial assistance (is) extended directly or through another recipient; including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance." 45 C.F.R. §84.3(f). As earlier noted, the

District Court made no finding as to federal financial assistance which would support the application of Section 504.

In construing Section 901(a) of Title IX of the Education Amendment of 1972, a statute similar to Section 504, this Court has held that to trigger statutory coverage, the threshold question of whether the *program* in question receives federal financial assistance must first be answered. *North Haven Board of Education, et al v. Terrel H. Bell, Secretary, Department of Education, et al,* _____U.S._____ 102 S.Ct. 1912 (1982). *See also Board of Public Instruction of Taylor County, Fla. v. Finch,* 414 F.2d 1068 (5th Cir. 1969). The Court's decision in *North Haven Board of Education* underscores the UIL's position that the District Court did not have jurisdiction under Section 504 to enter the preliminary injunction.

The Court of Appeals concluded, however, that because the case was "moot" on appeal, the court was precluded from determining whether the District Court was in error when it entered preliminary injunctive relief for Jane Doe. The sole fact that John Doe was allowed to play football under an erroneously entered injunction—an injunction which was awarded pursuant to a mistake of law—is not legally sufficient justification to allow an attorney's fee award to stand. *Doe v. Busbee, Supra.* See *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861 (8th Cir. 1977); *Hedberg v. State Farm Mutual Automobile Insurance Co.,* 350 F.2d 924 (8th Cir. 1965).

A prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises,* 390 U.S. 400 (1967). The circumstances presented by the case at bar—unresolved jurisdictional questions coupled with the fact that no significant issue raised by Jane Doe has ever been resolved in her

favor—clearly demonstrate that this Court should examine the Court of Appeals' decision and determine whether attorney's fees were properly entered in the case pursuant to 42 U.S.C. §1988 and the "prevailing party" standard.

2. The award of attorney's fees violates due process and "Our Federalism."

The courts' award of attorney's fees against the named defendants, without an examination of their arguments regarding the District Court's (lack of) jurisdiction, violates the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[2] Without regard to the question of whether the UIL is a person, "Our Federalism", together with the Fifth Amendment's guarantee of fundamental fairness, constitutionally prohibits the federal government, by enacting 42 U.S.C. §1988 and by judicial interpretation, from exacting money from the states and their agencies without a showing of culpability. *Younger v. Harris,* 401 U.S. 37 (1971). Congress simply cannot impose sanctions over state defendants and permit a monetary recovery, awarded by either a whim or mistake of the federal judiciary, unless those defendants are first given the chance to expose the error of a court's action. Imposing substantial liabilities on a state or its agents without requiring a finding of fault offends the doctrine of "Our Federalism."[3]

2. Whether the UIL is a "person" within the parameters of the Fourteenth Amendment has never been resolved. See *Monell v. Soc. Serv. of New York,* 436 U.S. 658 (1978). However, it should be noted that there are nine defendants in the case at bar who have been sued in their "individual" capacities. Clearly the rights of these persons are protected by the Fourteenth Amendment. Attorney's fees should not issue against them in the absence of bad faith. *Williams v. Alioto,* 625 F.2d 845, 848 (9th Cir. 1980) (per curiam), *cert. denied,* 450 U.S. 1012 (1981).

3. As U.S.C. §1988 has been construed by the Court of Appeals, the statute is "appropriate" legislation for triggering the guarantees of the Fourteenth Amendment of the U.S. Constitution.

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

DAVID R. RICHARDS
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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Laura S. Martin, Assistant Attorney General, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was served upon Respondent by depositing same in the United States mail, certified, return receipt requested to the following attorney of record for Appellee-Respondent: Mr. Matthew Horowitz, University of Connecticut School of Law, Civil Clinic, 1800 Asylum Avenue, West Hartford, Ct 06117, on this the _____ day of April, 1983.

LAURA S. MARTIN
Assistant Attorney General

APPENDIX

APPENDIX

1. Opinion of the Court of Appeals

2. District Court Order

3. District Court Judgment

4. Fifth Circuit Judgment

5. Opinion of the Court of Appeals (Earlier)

6. Fifth Circuit Judgment (Earlier)

7. District Court Order (Earlier) ["Reasons for Granting of Preliminary Injunction"]

JANE DOE, on behalf of John Doe, a minor,
Plaintiffs-Appellees,

v.

BAILEY MARSHALL, Director of the University Interscholastic League, et al, *Defendants-Appellants.*

No. 82-2107
Summary Calendar.

United States Court of Appeals, Fifth Circuit.

Jan. 6, 1983.

Following remand, 622 F.2d 118, of appeal from judgment entered by the United States District Court for the Southern District of Texas, Cowan, J., 459 F.Supp. 1190, in civil rights action, the District Court, Hugh Gibson, J., entered award of attorney fees, and appeal was again taken. The Court of Appeals, Tate, Circuit Judge, held that prior appellate decision that attorney fees could be awarded in civil rights case absent determination of merits of plaintiff's underlying cause of action where plaintiff, who obtained requested preliminary relief, was found to be prevailing party was controlling "law of case" upon appeal from attorney fee award made on remand, and the Court of Appeals was not required, on the prior appeal, to have vacated District Court judgment and remanded with directions to dismiss, even though injunctive relief sought was found to have become moot.

Affirmed.

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Prior appellate decision that attorney fees could be awarded in civil rights case absent determination of

merits of plaintiff's underlying cause of action where plaintiff, who obtained requested preliminary relief, was found to be prevailing party was controlling "law of case" upon appeal from attorney fee award made on remand, and the Court of Appeals was not required, on the prior appeal, to have vacated district court judgment and remanded with directions to dismiss, even though injunctive relief sought was found to have become moot.

Appeal from the United States District Court for the Southern District of Texas.

Before GEE, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

This is an appeal from an award of attorney's fees. 42 U.S.C. § 1988. Finding that the issue presently raised was determined adversely to the defendants-appellants on a prior appeal, we affirm on the "law of the case" principle.

On a prior appeal, we found that subsequent events had mooted the preliminary injunctive relief initially afforded the plaintiff, and—over objection of the defendants that the merits should be determined—vacated the preliminary injunction as moot and remanded the case to the district court "for a determination of appropriate attorney's fees." *Doe v. Marshall,* 622 F.2d 118, 120 (5th Cir.1980), *cert. denied, sub. nom. Marshall v. Doe,* 451 U.S. 993, 101 S.Ct. 2336, 68 L.Ed.2d 855 (1981). In so remanding, this court specifically found that the plaintiff was a prevailing party by virtue of the preliminary relief obtained. Id., 622 F.2d at 120.

By this second appeal, the defendants question the award of attorney's fees by the district court on remand. No issue is raised as to the amount; the sole

issue asserted is that the district court abused its discretion in making any award at all under the special circumstances presented by this case. The special circumstance relied upon is that, allegedly, neither the trial nor appellate court had ever determined, prior to the remand hearing, that the plaintiff would prevail on the merits of her claim.[1] The defendants argue that this determination is a prerequisite to holding her to be a prevailing party. The defendants especially point out

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1. The basic suit is by the parent of a psychiatrically-handicapped child against the denial of her boy's right to participate in his high school football program. The cause of action is grounded upon Section 504, Rehabilitation Act of 1973, 29 U.S.C. § 794, which forbids denial of participation to handicapped children, by reason of their handicap, in any program receiving federal financial assistance. The defendants are the officers of an inter-high school league (which enforced a rule making the boy ineligible to play football), as well as the local school superintendent. The district court granted a preliminary injunction, specifically rejecting the defendants' contentions (a) that no private cause of action was created by section 794 and (b) that further exhaustion of administrative remedies were required; the court also rejected, but by implication only, a third contention: (c) that the League was not the "recipient" of federal funds, because the dues for its support were paid by member high schools (from funds that included commingled federal funds). (The evidence also shows that the high school football program itself, participation in which was denied the handicapped boy, was in part directly supported by federal funds.) Conceding the undisputed facts as to funding, the defendants urged (a), (b), and (c) on the first appeal. Our decision on first appeal, while determining the (a) issue adversely in order to ascertain federal jurisdiction, 622 F.2d at 118 n. 1, did not determine the other issues, in holding the injunctive relief now moot because the boy had now graduated from high school and had played football (as sought by the suit) throughout his senior year.

that the courts have never definitively passed upon one disputed essential of the plaintiff's cause of action.[2]

On the first appeal to this court, in rejecting the defendants' contention as to non-mootness, we specifically rejected the defendants' present contention that no attorney's fees could be awarded in this civil rights case absent a determination of the merits of the plaintiff's underlying cause of action. We held that under the Attorneys' Fees Act, 42 U.S.C. § 1988, it was necessary to determine only whether the plaintiff was a "prevailing party". 622 F.2d at 199-20 n. 4. Finding that the plaintiff was a prevailing party because she obtained the primary relief sought, we remanded to the district court for a determination of the appropriate attorneys' fees. 622 F.2d at 120.[3]

Under the "law of the case" principle, the issue now raised on this second appeal, having been determined adversely to the defendants on the first appeal, may not be re-litigated on this second appeal but instead will be decided in accordance with the ruling enunciated on that prior appeal. As stated by us in *Morrow v. Dillard*, 580 F.2d 1284, 1289-90 (5th Cir.1978):

---

2. The defendants point out (*see* (c) note 1*supra*) that the issue had never been explicitly determined whether enforcement of a rule by a League (only indirectly financed from federal funds), by a high school athletic program (which was in part federally financed), constituted the League a "recipient" of federal funds under section 794, so as thus to bring it within the statutory rule preventing them from denying participation in an athletic program.

3. The holding is in accord with later decisions of this circuit, such as *Williams v. Leatherbury*, 672 F.2d 549 (5th Cir.1982) and *Deerfield Medical Center v. City of Deerfield Beach*, 661 F.2d 328, 338-39 (5th Cir.1981) (explaining the application of a United States Supreme Court decision that defendants rely upon to contrary effect, as permitting the award of attorneys' fees to a prevailing party who obtains preliminary injunctive relief only).

> The doctrine of "law of the case" is a rule of practice under which a rule of law enunciated by a federal court "not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but [also] establishes the law which other courts owing obedience to it *must*, and which it itself will, normally, apply to the same issues in subsequent proceedings in the same case." 1B Moore's Federal Practice ¶ 0.404[1] (2d ed. 1974)(footnotes omitted, emphasis in original). The doctrine is "based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544, 94 L.Ed. 750 (1950); *Fontainebleau Hotel Corp. v. Crossman*, 286 F.2d 926, 928 (5th Cir.1961).[4]

The defendants inferentially recognize that they can obtain no relief on the present appeal unless our prior appellate ruling is ignored or set aside.

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4. *Morrow v. Dillard* (quoting the 1967 Fifth Circuit decision, *White v. Murtha*, 377 F.2d 428, 431-32) also notes, 580 F.2d at 1290:

> While the "law of the case" doctrine is not an inexorable command, a decision of a legal issue or issues by an appellate court establishes the "law of the case" and must be followed in all subsequent proceedings in the same case in the trial court or on a latter appeal in the appellate court, *unless* [1] the evidence on a subsequent trial was substantially different, [2] controlling authority has since made a contrary decision of the law applicable to such issues, or [3] the decision was clearly erroneous and would work manifest injustice.

None of these exceptions are shown to be applicable here.

On this second appeal, they now contend that, upon finding the prior appeal to be moot, the deciding panel in the earlier appeal should have followed the general rule applicable when an appeal is mooted: to vacate the district court judgment and to remand with directions to dismiss the case, so as to prevent preclusive effect of the first appellate opinion. *United States v. Munsingwear, Inc.* 340 U.S. 36, 39-40, 71 S.Ct. 104, 106-07, 95 L.Ed. 36 (1950). *See, e.g., University of Texas Systems v. Assaf,* 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81 (1978). The defendants suggest that, due to the prior panel's failure to follow this general rule, the preclusive danger inherent in failing to vacate the judgment has come to pass in this case. Accordingly, they call upon this panel in this second appeal to set aside the decree in the first appeal and to order dismissal of the case on the merits, as allegedly should have been ordered on the initial appeal.[5]

In making this contention that the prior appellate decision in this case was in error, the defendants essentially reurge contentions rejected by this court on the earlier appeal. As previously noted, in absence of exceptional circumstances not here shown to be present, the law-of-the-case principle inhibits us from resurrecting and giving favorable consideratin to contentions previously rejected by this court on the earlier appeal.

Accordingly, we AFFIRM the judgment below that awarded the plaintiff, as the prevailing party, attorneys' fees under 42 U.S.C. § 1988.

AFFIRMED.

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5. The defendants call on this panel upon this second appeal, "to review its [this Court's] earlier decision in this case" and to "remand the case back to the district court with an order to dismiss the case" so as to conform with the general mootness rule in *Munsingwear-Assaf.* Appellants' Reply Brief, pp. 7-9.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of John Doe, *Plaintiff*	§	
	§	CIVIL ACTION
v.	§	No. G-78-174
BAILEY MARSHAL, etc., et al, *Defendants*	§	

ORDER

Plaintiff brought this action for injunctive relief on behalf of her minor son, alleging that defendants had violated his rights under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. This Court's predecessor, the Honorable Finis E. Cowan, granted a preliminary injunction and the defendants appealed. During the pendency of this appeal, the plaintiff's request for injunctive relief became moot. Accordingly, the Fifth Circuit declined to hear the merits of the case. The Court of Appeals determined, however, that plaintiff was the prevailing party under the attorneys fees provision of the Civil Rights Act of 1964, 42 U.S.C. §1988, and remanded the case to this Court for a determination of appropriate attorneys fees. Defendants have repeatedly diverted this Court's attention from the narrow inquiry into attorneys fees with arguments that the Court should ignore the clear mandate of the Fifth Circuit and proceed to relitigate the merits of the case. Defendants' arguments strike no responsive chord; this Court sits to enforce the mandates of the Fifth Circuit, not to question them.

In awarding attorneys fees, the Court is guided by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). In *Johnson*, the Fifth Circuit set

forth twelve factors to be considered by the district court in arriving at an award of attorneys fees. *Id.* at 717-19. No one factor is controlling and all should be considered to the extent that they are relevant to the case.

Plaintiff's counsel seeks an award of attorneys fees at an hourly rate of $75 on a claim of 178.5 hours. Counsel expended 20 hours in the commencement of the action and the securing of preliminary injunctive relief for his client. Thirty hours of legal time are claimed in connection with research, preparation of memoranda, motions and affidavits in connection with an award of attorneys fees. A vast majority of the hours claimed, 128.5 hours, was consumed in the appellate process. A total of 114 hours involved defendants' appeal to the Fifth Circuit, and 14.5 hours were related to defendants' unsuccessful petitioning of the Supreme Court for a writ of certiorari.

In assessing counsel's hourly claim, the Court must weight the claim against its own knowledge, experience and expertise of the time required to complete similar activities. *Johnson v. Georgia Highway Express, supra,* at 717. In considering the hourly claim, the Court must, of course, take into account the novelty and difficulty of the questions involved in the case, and the skill requisite to the proper performance of legal services. At the commencement of this action, the case was for all practical purposes one of first impression with respect to several significant legal issues. A threshhold inquiry of overriding significance was whether section 504 of the Rehabilitation Act secured the plaintiff a private right of action. Beyond this, the question of what constituted discrimination under section 504 was and continues to be, a matter of some dispute. The factual questions in this case, however, were neither difficult nor novel; nor was the standard required for obtaining preliminary injunctive relief.

Counsel for a prevailing civil rights litigant is entitled to compensation for all time reasonably expended in advancing his client's interest. *Knighton v. Watkins,* 616 F.2d 795, 801 (5th Cir. 1980). Without a doubt, counsel is entitled to compensation for the 20 hours expended in securing preliminary injunctive relief for his client. The Court finds, however, that the expenditure of 114 hours in connection with defendants' appeal to the Fifth Circuit was excessive. When appeal was taken, the case remained essentially one of first impression involving several significant and complex legal issues. An appellate decision on the merits of these issues would have been of considerable precedential value. The record reflects that counsel expended 72 hours in research and drafting of plaintiff's appellate brief. There is no question as to the excellence of counsel's work product, his preparation, and the general ability displayed before this Court and the Court of Appeals. Nevertheless, counsel had initially explored and developed the legal issues at the lower court level, and the expenditure of such vast amounts of time in connection with the presentation of legal issues on appeal was not reasonably necessary.

The case became moot while on appeal. Through a combination of the preliminary relief granted and the passage of time, plaintiff ultimately obtained all relief sought. Even had the Fifth Circuit considered the case on the merits and reversed, plaintiff would still have obtained all the relief sought.

The Fifth Circuit's decision thus addressed only one aspect of the case: whether the plaintiff was a "prevailing party" so as to permit an award of reasonably necessary attorneys fees. Counsel seeks compensation for 32 hours expended in researching and drafting a supplemental brief on the mootness and attorneys fees issues, in oral arguments before the Court of Appeals, and in supplemental letter briefs requested by the Fifth Circuit. The Court is of the opinion that counsel spent

more time than is reasonably necessary in connection with these efforts. First, it is unclear to the Court why counsel required 12 hours for the research and preparation of a five-page supplemental appellate brief in view of his previous expenditure of 18 hours in the researching and drafting of a memorandum on attorneys fees filed in this Court. Second, although counsel expended 10.5 hours in the research and drafting of two letters requested by the Fifth Circuit in light of its intervening decision in *Camenisch v. University of Texas,* 616 F.2d 127 (5th Cir. 1980), some of this effort involved a reiteration of matters discussed in plaintiff's supplemental brief.

In sum, the Court finds that counsel is not entitled to compensation for all the time claimed in advancing his client's interests before the Fifth Circuit. An award taking into consideration an expenditure of 60 hours before the appellate court will reasonably compensate counsel for his legal representation. The Court, however, will award counsel compensation for all hours claimed in connection with defendants' unsuccessful petition to the Supreme Court for a writ of certiorari.

It is clear that it is defendants who, for the most part, have made the issue of attorneys fees a battleground in this case. Obviously, plaintiff's counsel is entitled to compensation for all time reasonably expended in connection with this issue. *Johnson v. Mississippi,* 606 F.2d 635 (5th Cir. 1979). Counsel claims 30 hours in connection with the presentation of the attorneys fees issue before this Court. Even taking into account that the amount of time expended by counsel was dictated principally by defendants' strident opposition to the propriety of the award, the Court finds an expenditure in excess of 20 hours was not reasonably necessary. Therefore, the Court will award attorneys fees in consideration of the expenditure of 115 hours, which the Court finds was reasonably necessary in the advancement of plaintiff's interests.

Counsel seeks compensation at a rate of $75 per hour. There is substantial evidence in the record that $75 per hour is the customary fee for similar work in this community. Plaintiff's counsel, however, misreads *Johnson* in arguing that the fee rate in civil rights cases should be *predicated* upon the customary fee in the community. Clearly, it is an important, but not controlling, consideration. *Johnson v. Georgia Highway Express, supra*, at 718. While the Court finds an hourly award of $75 to be appropriate under the circumstances in this case, it has not done so without consideration of the manifold factors set forth in *Johnson*. As a general rule, more experienced attorneys should receive greater compensation. However, the young attorney who demonstrates requisite skill and ability, particularly one who specializes in the area of civil rights, should not be penalized for only recently being admitted to the bar. In this case, plaintiff received competent, workmanlike, and effective assistance of counsel. As a direct result of counsel's efforts, plaintiff received all relief to which she alleged entitlement. The fact that plaintiff's counsel had been practicing law for only two years at the time this action was commenced is of no moment in view of the skill and diligence with which counsel prosecuted plaintiff's law suit. *See Id.* at 718-19. Moreover, counsel, as an employee of the American Civil Liberties Union, agreed to take the case without a fixed or contingent fee, and has looked only to the statutory provisions as a basis for an award. An hourly award of $75 is consonant with awards in similar cases.

Other considerations listed in *Johnson* have little or no bearing upon the present case. While lengthy appellate review may well have precluded other employment opportunities for plaintiff's counsel, the record does not so reflect. And while this case, like many other civil rights cases, might be considered "undesirable" because of potential economic impacts on an attorney's practice, it is widely acknowledged that "undesirable" cases are the ACLU's forte. Certainly, there is no

evidence that counsel's representation of plaintiff in this civil rights action had or will have any economic impact on his practice.

The statutory provision authorizing the award of attorneys fees in cases such as this was not enacted for the benefit of lawyers, but rather to enable litigants to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition and to place the economical burden of civil right litigation fairly. Adequate compensation is necessary, however, to enable an attorney to serve his client effectively and to preserve the integrity and independence of the profession. In this case, the Court is of the opinion that an award of $8,625.00 will adequately and effectively serve the purposes for which the statute was enacted. Therefore it is

ORDERED, ADJUDGED, and DECREED that plaintiff is awarded attorneys fees in the amount of $8,625.00 in accordance with the mandate of the Fifth Circuit Court of Appeals.

DONE this the 11th day of February, 1982, at Galveston, Texas.

/s/

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of John Doe, *Plaintiff*	§	
	§	CIVIL ACTION
v.	§	No. G-78-174
BAILEY MARSHAL, etc., et al, *Defendants*	§	

FINAL JUDGMENT

This case having been remanded from the Fifth Circuit for an award of attorneys fees and being in all other respects moot, now be it

ORDERED, ADJUDGED and DECREED that plaintiff is awarded attorneys fees in the amount of EIGHT THOUSAND SIX HUNDRED TWENTY-FIVE DOLLARS ($8,625.00); and further

ORDERED that the case be, and the same hereby is DISMISSED.

Taxable costs of court, if any, are assessed against the defendants.

This is a final judgment.

DONE this the 11th day of February, 1982, at Galveston, Texas.

/s/

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Summary Calendar

D.C. Docket No. CA-G-78-174

JANE DOE, on behalf of John Doe, a minor,
Plaintiff-Appellee,

versus

BAILEY MARSHALL, Director of the University Interscholastic League, and Member of the Executive Committee, Individually and in his Official Capacity, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GEE, RANDALL and TATE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

January 6, 1983

Issued as Mandate: 1-28-83

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Plaintiff-Appellee,

V.

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY INTERSCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Defendants-Appellants

No. 78-3065.

United States Court of Appeals, Fifth Circuit.

July 21, 1980.

Action was brought on behalf of emotionally handicapped minor for injunctive relief which would allow minor to play interscholastic high school football at school to which he had transferred for medical reasons, despite interscholastic league's transfer regulations. The United States District Court for the Southern District of Texas, Finis E. Cowan, District Judge, granted a temporary injunction allowing minor to play football, and Defendant appealed. The Court of Appeals, Godbold, Circuit judge, held that: (1) the case was rendered moot by graduation of the minor, who had continued to play football throughout his senior year, and (2) even though the case was rendered moot, Plaintiff was entitled to an award of attorney fees.

Vacated and remanded.

1. FEDERAL COURTS 757

Action brought on behalf of emotionally handicapped minor for injunctive relief which would allow minor to play interscholastic high school football at school to which he transferred for medical reasons, despite interscholastic league's transfer regulations, was moot where minor, who had continued to play football throughout his senior year in high school during pendency of the appeal, had graduated, and the case was not salvaged either by fact that Plaintiffs were required to post a $15 injunction bond or by their request for attorneys fees. Rehabilitation Act of 1973, §504, 29 U.S.C.A. §794.

2. CIVIL RIGHTS 13.17

A determination of mootness on appeal neither precludes nor is precluded by an award of attorney fees; question of attorney fees turns instead on wholly independent consideration of whether Plaintiff is a "prevailing party". 42 U.S.C.A. §1988.

3. FEDERAL CIVIL PROCEDURE 2737

Even preliminary relief may serve to make a Plaintiff a "prevailing party" such as would entitle him to award of attorney fees. 42 U.S.C.A. §1988.

4. FEDERAL CIVIL PROCEDURE 2737.5

Plaintiff, who obtained a temporary injunction allowing her emotionally handicapped minor son to play interscholastic high school football despite interscholastic league's transfer regulations was entitled to attorney fees even though the case was rendered moot during appeal by minor's graduation.

Appeal from the United States District Court for the Southern District of Texas.

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

GOLDBOLD, Circuit Judge:

Appellee brought this action for injunctive relief on behalf of her minor son, John Doe, alleging that Appellants had infringed his rights under §504 of the Rehabilitation Act of 1973, 23 U.S.C. §794.[1] The minor, who had remained anonymous throughout these proceedings, is an emotionally handicapped individual who transferred from one school district to another for medical reasons. Appellant University Interscholastic League (UIL) interpreted its own transfer regulations to preclude John from playing football at his new school. The district court found that all four factors necessary for preliminary relief were present,[2] and granted a temporary injunction allowing John to play football. The UIL appeals.

---

1. Section 504 creates a private right of action in addition to the administrative remedies it provides. *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). We are thus not faced with a case in which no federal jurisdiction exists because the sole issue presented is interference with the right to play football. See *Mitchell v. Louisiana High School Athletic Association*, 430 F.2d 1155 (5th Cir. 1970). Instead, the refusal to allow John to play football infringes on statutorily-created federal right and thus the claim asserts a federal cause of action. See *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 156 (5th Cir. 1980).

2. Those factors are:

> 1. Irreparable harm to the Plaintiff from failure to issue the injunction.
>
> 2. The relative lack of harm to the Defendant from issuance of the injunction.
>
> 3. The public interest.
>
> 4. Probability that the Plaintiff will ultimately succeed on the merits. *Camenisch v. University of Texas*, 615 F.2d 127, 130 (5th Cir. 1980).

[1] During the pendency of this appeal, John has graduated from high school, having continued to play football throughout his senior year. This suit was not brought as a class action, and appellant sought only injunctive relief and not damages. There is, therefore, no longer a justiciable case or controversy and the case is moot.

Appellants contend that this case is "capable of repetition, yet evading review," and thus is within an established exception to the doctrine of mootness. *Roe v. Wade*, 410 U.S. 113, 125, 93 S.Ct. 705, 713, 35 L.Ed.2d 147, 161 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515, 31 S.Ct. 279, 283, 55 L.Ed. 310, 316 (1911). This argument must fail in light of *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974). In this case, as in *DeFunis*, the student has completed his final term in school, and "will never again be required to run the gauntlet" of the UIL's transfer policies, *id.* at 319, 94 S.Ct. at 1707, 40 L.Ed.2d at 170. Moreover, as in *DeFunis*, there is no reason to suppose that future attacks on the UIL's rules will similarly evade review. *Id.* Finally, the case meets neither of the tests set out in *Walsh v. Louisiana High School Athletic Association*, 616 F.2d 152, 157 (5th Cir. 1980); the effect of the rule is not too short in duration to be fully litigated prior to its cessation or expiration, and there is no reasonable expectation that the Plaintiff will be subjected to the same difficulties again.

Appellants also contend that the fact that Appellees were required to post a $15.00 injunction bond keeps the controversy alive, citing *Camenisch v. University of Texas*, 616 F.2d 127 (5th Cir. 1980). Camenisch may be distinguished on two grounds. First, the bond in *Camenisch* could not be dissolved without an adjudication on the merits; the question presented in that case was which party ought to pay particular costs, and the bond constituted Plaintiff's guarantee of payment should the burden ultimately fall on him. In this case,

Appellants have neither advanced monies nor suffered financial harm, so there will be no ultimate liability on the bond. Second, *Camenisch* involved a $3,000 bond; the $15.00 bond posted in this case must be considered de minimus by comparison.

Appellants' final argument is that appellee's request, under 42 U.S.C. §1988, for attorneys' fees salvages an otherwise moot case.[3] This court has frequently refused to consider the merits of an otherwise moot case and has left the question of attorneys' fees for the district court on remand. See, e.g., *Johnson v. Mississippi*, 586 F.2d 387 (5th Cir. 1978); *McDonald v. Oliver*, 525 F.2d 1217 (5th Cir.), cert. denied, 429 U.S. 817, 97 S.Ct. 61, 50 L.Ed.2d 77 (1976).[4] Moreover, a determination of mootness does not prevent an award of attorneys' fees on remand. *Reiser v. Del Monte Properties Co.*, 605 F.2d 1135, 1140 (9th Cir. 1979); *Criterion Club of Albany v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979); *Ramey v. Cincinnati Enquirer, Inc.*, 508 F.2d 1188, 1196 (6th Cir. 1974), cert. denied, 422 U.S. 1048, 95 S.Ct. 2666, 45 L.Ed.2d 700 (1975).

---

3. Appellee also urges this contention, apparently fearful that a determination of mootness by this court would preclude any award of attorneys' fees. Our discussion of attorneys' fees rejects both arguments.

4. In *Rainey v. Jackson State College*, 481 F.2d 347 (5th Cir. 1973), the court proceeded to the merits of a moot case in order to resolve a claim for attorneys' fees. *Rainey* is inapposite. In that case, the district court reached a final deremination on the merits after a prelimiry injunction had mooted the case. The case was thus already moot when it was tried in the district court. The Attorneys' Fees Act, 42 U.S.C. §1988, had not been enacted when Rainey was decided and the standard for awarding attorneys' fees was whether Defendant had been "unreasonable and obdurately obstinate". *Id.* at 350. This standard required examining the merits. As discussed below, §1988 requires only that Plaintiff be a "prevailing party".

[2-4] Thus a determination of mootness neither precludes nor is precluded by an award of attorneys' fees. The attorneys' fees question turns instead on a wholly independent consideration: whether Plaintiff is a "prevailing party." *Johnson v. Mississippi*, 606 F.2d 635 (5th Cir. 1979); *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979); *Morrow v. Dillard*, 580 F.2d 1284 (5th Cir. 1978). Even preliminary relief may serve to make a Plaintiff a "prevailing party" under the statute; the lawsuit need not proceed to completion. *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979); *Iranian Students Association, supra; Criterion Club, supra; International Society for Krishna Consciousness, Inc. v. Andersen*, 569 F.2d 1027 (8th Cir. 1978); *Brown v. Culpepper*, 559 F.2d 274 (5th Cir. 1977). All that is required is that the Plaintiff obtain the primary relief sought. *Iranian Students Association, supra*, 604 F.2d at 353; *Adams v. Reed*, 567 F.2d 1283, 1288 (5th Cir. 1978). That requirement has been satisfied in this case.

We therefore vacate the preliminary injunction as moot, and remand the case to the district court for a determination of appropriate attorneys' fees.

VACATED and REMANDED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 78-3065

D.C. Docket No. CA-G-78-174

JANE DOE, on behalf of John Doe, a minor,
Plaintiff-Appellee,

versus

BAILEY MARSHALL, Director of the University Interscholastic League, and Member of the Executive Committee, Individually and in his Official Capacity, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Texas

Before GODBOLD, TJOFLAT and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the order of the District Court appealed from, in this cause be, and the same is hereby, vacated, and that this cause be, and the same is hereby remanded to the said District Court for a

determination of appropriate attorneys' fees in accordance with the opinion of this Court;

It is further ordered that each party pay its own costs on appeal.

July 21, 1980

Issued as Mandate: 10-8-80

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of JOHN DOE, a minor, *Plaintiff*	§	
V.	§	CIVIL ACTION NO. G-78-174
BAILEY MARSHALL, Director of the University Interscholastic League, Et Al., *Defendants*	§	

Matthew Horowitz, Houston, Texas
For Plaintiff

Robert W. Gauss, Assistant Attorney General,
Austin, Texas
For Defendant UIL

REASONS FOR GRANTING OF PRELIMINARY INJUNCTION

For the reasons stated herein, the Court has concluded that the Plaintiff is entitled to a preliminary injunction restraining the Defendants from barring Plaintiff from interscholastic competition and restraining the Defendant McKenzie from denying to the Plaintiff the right to participate in interscholastic athletics, particularly football, during the school year 1978-79. The reasons for the granting of this relief are set forth herein.

ESSENTIAL FACTS

The parties have appeared, introduced evidence, and on the basis of this evidence the Court finds that the

facts set forth in the Plaintiff's Original Complaint, a copy of which is appended hereto as Exhibit A, are essentially correct, at least for purposes of determining the Plaintiff's right to a preliminary injunction.

The essential facts are:

1. John Doe is a "handicapped" individual within the meaning of 29 U.S.C. §794.

2. John Doe, because of an unusual set of circumstances, has a legitimate, compelling necessity for living with his grandparents rather than his parents.

3. John Doe, because of his severe psychiatric difficulties, has a genuine, compelling need to participate in interscholastic football, and denying him this right, under the circumstances, would create irreparable harm. Participation in athletics during his senior year could mean the difference between John Doe's growing up as a normal, productive adult, as distinguished from the possibility of his being institutionalized for the rest of his life.

Plaintiff has exhausted her apparent administrative remedies with the Alvin Independent School District (hereinafter AISD) and with the University Interscholastic League (hereinafter UIL), seeking relief from AISD, from the UIL, and from the District Executive Committee of the UIL which preliminarily determines eligibility.

Plaintiff seeks relief under 42 U.S.C. §1983 and 29 U.S.C. §794. 42 U.S.C. §1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be sub-

> jected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

29 U.S.C. §794 reads:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(6) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

A review of the legislative history and the cases which illuminate §794 reveal that this congressional enactment, for practical purposes, places upon school districts and agencies which receive federal funds, such as the Defendants, the duty of analyzing individually the needs of each handicapped student and devising a program which will enable each individual handicapped student to receive an appropriate, free public education. The failure to perform this analysis and structure a program suited to the needs of each handicapped child, constitutes discrimination against that child and a failure to provide an appropriate, free public education for the handicapped child. *Lau v. Nichols,* 414 U.S. 563, 94 S.Ct. 786, 30 L.Ed.2d (1973); *Crawford v. University of North Carolina,* 440 F.Supp. 1047 (ND NC 1977); *Hairston v. Drosick,* 423 F.Supp. 180 (SC W. Va. 1976); *Camenisch v. University of Texas,* _____F.Supp._____(WD Tx 1978); *Fialkowski v. Shapp,* 405 F.Supp. 946 (ED Pa 1975).

In this particular case, AISD is willing to perform its legal duty. AISD has, however, in effect, delegated to the UIL the right to determine which students will participate in interscholastic athletics.

The challenged rule of the UIL would, as construed by UIL, prohibit John Doe's playing football for AISD. There is apparently no structure within the organizational scheme of the UIL which provides a mechanism by which special and individual cases, such as John Doe's, may be given special and individual handling.

A review of the facts and the authorities set forth above has persuaded this Court that there is a reasonable probability that the Plaintiff will prevail on the merits.

The Court, in determining whether or not to grant a preliminary injunction, must also balance the harm which will be inflicted upon the Plaintiff, if relief is not granted, against the harm which will be visited upon the Defendants in the event relief is granted. In this case, as in the recent case of *Kite v. University Interscholastic League,* _____F.Supp._____(SD Tx 1978), the balancing task is easy. The harm which would be inflicted upon this young man were he denied the opportunity to play football in his senior year at Alvin may be enormous. Playing football in his senior year may make the difference between this young man's growing up into a productive, happy individual, or, on the contrary, being institutionalized for the balance of his life. Denying this young man and his parents the right to the individualized treatment which 20 U.S.C. §794 mandates, is a severe deprivation.

No harm is visited on the UIL, in this court's view, by the preliminary injunction. The UIL rule in question was designed to prevent recruiting abuses and to prevent an athlete from irresponsibly "shopping around"

for a school or a coach. There is no suggestion or hint in the evidence that either of these evils is in any degree involved here, and the Plaintiff has proved persuasively that there are compelling medical and psychiatric reasons why this young man needs to go to school in Alvin, and needs to play football on the Alvin team.

The Court needs to balance the questions involved here in the light of the public interest. This Court believes that 29 U.S.C. §794 is a humane, and reasoned statute and that the public interest is served by its enforcement. In any event, regardless of this Court's veiws concerning 29 U.S.C. §794, it is the law as enacted by the Congress of the United States, and it is this Court's duty under 42 U.S.C. §1983 to enforce it.

Defendants contend that 29 U.S.C. §794 does not provide a private right of action. The law is to the contrary. See *Lau v. Nichols, supra; Cort v. Ash,* 442 U.S. 66, 45 L.Ed.2d 26 (1975); *Lloyd v. Regional Transportation,* 548 F.2d 1277 (7th Cir. 1977); *United Hanidcapped Federation v. Andre,* 558 F.2d 413 (8th Cir. 1977); *Kampmeier v. Nyquist,* 553 F.2d 296 (2nd Cir. 1977).

For the reasons set forth above, this Court has determined to grant a preliminary injunction enjoining the Defendants from taking any action to prevent John Doe from playing football for Alvin Independent School District, during the football season commencing in August of 1978. This case is not a class action. The relief granted is granted only to John Doe and his parents, and is granted only pending the trial of this case on the merits.

DONE this the 16th day of August, 1978.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

JANE DOE, on behalf of	§	
JOHN DOE, a minor,	§	
Plaintiff	§	
V.	§	Civil Action
	§	No. G-78-174
BAILEY MARSHALL,	§	
Director of the University	§	
Interscholastic League,	§	
Et al.,	§	
Defendants	§	

INJUNCTION

For the reasons stated in that document of even date herewith entitled "Reasons for Granting of Preliminary Injunction," the court hereby GRANTS a preliminary injunction, and pending trial of this case on the merits, enjoins the Defendants from interfering with, or preventing the minor Plaintiff, JOHN DOE, from full participation in the football program at Alvin Independent School District during the school year commencing in August 1978; and enjoining the Defendants from taking any action which would prohibit, impede or interfere with the rights of Alvin Independent School District to participate fully in the activities of the University Interscholastic League because of John Doe's participation on the Alvin Independent School District team. Plaintiff shall post a bond in the amount of Fifteen Dollars ($15.00).

The papers in this case which were previously sealed are now ordered unsealed since this matter has now been heard fully in open court.

DONE this the 16th day of August, 1978.

United States District Judge

Office-Supreme Court, U.S.
FILED
MAY 17 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1654

In The
Supreme Court Of The United States

OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY SCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Petitioners

v.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Respondent

BRIEF IN OPPOSITION TO CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly determined that the issue of Plaintiff's entitlement to attorney's fees is controlled by the doctrine of law of the case?

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No. 82-1654

In The

Supreme Court Of The United States

OCTOBER TERM, 1982

BAILEY MARSHALL, DIRECTOR OF THE UNIVERSITY SCHOLASTIC LEAGUE, AND MEMBER OF THE EXECUTIVE COMMITTEE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY, ET AL.,
Petitioners

v.

JANE DOE, ON BEHALF OF JOHN DOE, A MINOR,
Respondent

BRIEF IN OPPOSITION TO CERTIORARI

Jane Doe, Plaintiff/Appellee below, respectfully requests that this Court deny the petition for writ of certiorari filed by the officers of the University Interscholastic League.

OPINIONS BELOW

The first opinion of the Court of Appeals is reported at 622 F.2d 118. The second opinion of the Court of Appeals is reported at 694 F.2d 1038. The first opinion of the District Court is reported at 459 F.Supp. 1190. These opinions are reproduced in the petition of the University Interscholastic League with the exception of the appendix to the District Court's initial opinion which was omitted.

ADDITIONAL RELEVANT STATUTES AND REGULATIONS

29 U.S.C. §749(a) states in pertinent part:

> "In any action or proceeding to enforce a charge or violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The Internal Operating Procedures Manual of the United States Court of Appeals for the Fifth Circuit states at p. 7:

> **Motion to Expedite Appeal.** Motions for this relief should be presented in the same manner as other motions. An appeal may be expedited only by the Court and for good cause shown. If an appeal is ordered expedited, the Clerk will fix a briefing schedule which will permit the appeal to be set for oral argument at an early date, unless an earlier hearing date is directed by a judge. The Clerk will usually have some idea of the approximate date of the hearing and will so advise counsel when the order is issued.

Rule 8(a) of the Federal Rules of Appellate Procedure states:

(a) **Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.** Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying or restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable, or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court.

Rule 27(a) of the Federal Rules of Appellate Procedure states:

(a) **Content of Motions; Response; Reply.** Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other

parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice and the court may shorten or extend the time for responding to any motion.

Rule 54(d) of the Federal Rules of Civil Procedure states:

(d) **Costs.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

34 C.F.R. §104.3(f) states:

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a

recipient, but excluding the ultimate beneficiary of the assistance.

34 C.F.R. §104.4(b)(1) and (b)(4) state, in pertinent part:

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual licensing, or other arrangements, on the basis of handicap:

> (i) Deny a qualified handicapped person the opportunity to participate in a benefit, aid, or service;
>
> (v) Aid or perpetuate discrimination against a qualified handicapped person by providing a significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program.

4. A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same state.

STATEMENT OF THE CASE

Summary of Proceedings

Plaintiff filed this action on August 7, 1978, in Federal District Court for the Southern District of Texas, Galveston Division. Her complaint alleged violations of her son's rights under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794 (hereinafter Section 504). Plaintiff alleged causes of action under Section 504 and 42 U.S.C. Section 1983.

The trial court conducted an evidentiary hearing on August 11, 1978 and on August 16, 1978, entered a preliminary injunction that granted Plaintiff all the relief she sought.

On August 24, 1978, the University Interscholastic League (hereafter "the U.I.L.") perfected an appeal to the Fifth Circuit.

On December 19, 1979, Plaintiff filed a motion with the trial court for an award of attorney's fees. The court decided to defer reaching this issue pending the outcome of the appeal.

On July 21, 1980, the Fifth Circuit vacated the preliminary injunction on mootness grounds, ruled that Plaintiff was entitled to a fee award as the prevailing party, and remanded to the trial court for a determination of the appropriate sum of fees.

In August 1980, the U.I.L. filed a petition with the Fifth Circuit for a rehearing en banc. The court denied the petition and issued its mandate on October 2, 1980.

On October 15, 1980, Plaintiff filed a supplemental motion for attorney's fees with the trial court. However, the U.I.L. filed an application for writ of certiorari with

this Court and the trial court decided to defer a decision on attorney's fees pending a final disposition.

On May 18, 1981, this Court denied the U.I.L.'s petition.

On June 10, 1981, Plaintiff filed her third motion for attorney's fees with the trial court. An evidentiary hearing was held in July 1981, and, in February 1982, the trial court ordered a fee award pursuant to 42 U.S.C. Section 1988 and 29 U.S.C. Section 794a.

On March 8, 1982, the U.I.L. perfected an appeal to the Fifth Circuit. Soon thereafter, the U.I.L. secured a stay as a matter of right pursuant to Rule 62(d) of the Federal Rules of Civil Procedure.

On January 6, 1983, the Fifth Circuit ruled that the U.I.L.'s appeal was barred by the doctrine of "law of the case."

Statement of Facts

Plaintiff brought this action on behalf of her son, John Doe. At the time this suit was filed, John Doe was seventeen years old and was about to begin his senior year in high school.

Defendant Bailey Marshall is the Director of the U.I.L. The U.I.L. is an organization composed solely of public schools that is affiliated with the Bureau of Public School Services of the University of Texas. The U.I.L. is the rule-making and policy-making body for all interscholastic competition among public schools in the State of Texas. It is empowered to enforce compliance with its rules by various devices, including the suspension of non-complying schools from post-season tournament competition.

The U.I.L. is funded by dues assessments from its member schools. Public school districts in Texas, including the Defendant Alvin School District, fund their athletic programs, in part, with federal grants.

John Doe resided with his parents in Friendswood, Texas and attended the public schools in Friendswood until March 1978. John Doe suffered from serious psychiatric problems which had been manifested in violent behavior directed toward his parents and in poor academic performance. After a series of particularly violent family episodes in late 1977 and early 1978, John Doe's psychologist recommended that he be removed from his parent's home. In March 1978, John Doe began living with his grandparents in Alvin, Texas. He also began attending Alvin High School. Subsequent to this move, John Doe's emotional status, his performance in school, and his relationship with his parents improved markedly, and it was agreed that he should remain with his grandparents and continue to attend Alvin High for the 1978-79 school year.

John Doe played varsity football when he attended the Friendswood public schools, and he wished to continue this activity at Alvin High School. Football was very important to John Doe, and his mother believed that it was the primary factor that motivated him to remain in school despite academic problems and an inability to successfully interact with his peers. Moreover, John Doe's psychologist had concluded that his participation in football was therapeutically significant in that "it allows him an outlet for some of his tension and aggressive feelings in a very structured and controlled manner."

The Superintendent of John Doe's new school district did not object to his participation in the varsity football program. However, he advised Plaintiff to first contact the U.I.L. in order to accommodate the U.I.L.'s residency rule. That rule virtually precludes students from engaging in interscholastic competition for one academic year where they

have transferred schools and their parents do not reside in their new school district. The purpose of the rule is to prevent tampering by coaches and to deter disenchanted athletes from "shopping" for new schools.

Plaintiff conferred with U.I.L. officials about John Doe's eligibility status in the spring of 1978. She was informed that John Doe would be barred from participating in interscholastic athletics at Alvin High School.

On June 27, 1978, Plaintiff filed a complaint with the Office of Civil Rights of the Department of Health, Education, and Welfare (hereafter OCR), alleging that the U.I.L. was prohibiting John Doe from participating in interscholastic sports in violation of Section 504 of the Rehabilitation Act. Football practice was scheduled to begin in mid-August, and when it became clear as of August 7 that OCR could not resolve this matter by the beginning of the football season, Plaintiff filed this lawsuit.

As a result of the trial court's preliminary injunction order, John Doe played varsity football during the fall of 1978 and graduated from high school in May 1979. The U.I.L. did not attempt an expedited appeal, and its appeal was argued and decided in 1980.

The Prior Decisions

In its preliminary injunction order of August 16, 1976 (hereafter, "the first trial decision"), the trial court ruled that the Alvin Independent School District (hereafter A.I.S.D.) was a recipient of federal funds; that John Doe was a "handicapped" individual within the meaning of Section 504; that, as a result of his handicap, he had a "legitimate and compelling" therapeutic need to attend A.I.S.D. and to be eligible for interscholastic competition; and that the U.I.L. could readily have accommodated John Doe's special needs without expense and without jeopardizing the objectives that its residency rule was designed

to address. For these reasons, the trial court held that Plaintiff would most likely prevail on her claim that the U.I.L. had violated Section 504, and it entered a preliminary injunction restraining the Defendants from interfering with John Doe's participation in interscholastic sports.

On the U.I.L's appeal from the preliminary injunction order (hereafter "the first appellate decision"), the Fifth Circuit ruled that because John Doe had graduated from high school, the case was moot. The court held that Plaintiff's pending attorney's fees motion did not salvage an otherwise moot case and did not entitle the U.I.L. to review of the merits. The court also ruled that because Plaintiff had secured all the relief she sought by virtue of the preliminary injunction order, she was a prevailing party and was entitled to an award of attorney's fees. The court vacated the preliminary injunction as moot and remanded the case to the trial court for a determination of appropriate attorney's fees.

Following the Supreme Court's denial of the U.I.L.'s certiorari petition (hereafter "the first certiorari petition"), the trial court conducted an evidentiary hearing on the appropriate sum of attorney's fees. In an order dated February 11, 1982 (hereafter "the second trial decision"), the trial court rejected the U.I.L.'s argument that it should ignore the mandate of the Fifth Circuit and require the parties to relitigate the merits. The trial court ordered an award of fees in the sum of $8,026.00.

On the U.I.L.'s appeal from the attorney's fees order (hereafter "the second appellate decision"), it reasserted the identical issues decided in "the first appellate decision" and raised in its "first certiorari petition;" namely, that the Plaintiff was not a prevailing party and that the U.I.L. was entitled to appellate review of the merits of "the first trial decision" by virtue of Plaintiff's claim for fees. The Fifth Circuit ruled that the U.I.L.'s arguments were barred by the doctrine of "law of the case."

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY DETERMINED THAT THE ISSUE OF PLAINTIFF'S ENTITLEMENT TO ATTORNEY'S FEES IS CONTROLLED BY THE DOCTRINE OF LAW OF THE CASE.

This Court has consistently ruled that issues brought to its attention in a prior petition cannot be reexamined in a subsequent petition in the same suit. See, e.g., *Insurance Group Committee v. Denver & Rio Grande Western Railroad Co.*, 329 U.S. 607, 612 (1947); *United States v. New York Indians*, 173 U.S. 464, 472-73 (1899); *Chaffin v. Taylor*, 116 U.S. 567, 572 (1886); *Clark v. Keith*, 106 U.S. 464 (1882); *Ames v. Quimby*, 106 U.S. 342, 349 (1882); *The Lady Pike*, 96 U.S. 461, 462 (1877); *Supervisors v. Kennicott*, 94 U.S. 498, 499 (1876). The rationale goes to the very integrity of the judicial process.

> "To allow a second writ of error or appeal to a court of last resort on the same questions which were open to dispute on the first, would lead to endless litigation. . . . [T]here would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members." *Roberts v. Cooper*, 61 U.S. (20 How.) 467, 481 (1857).

The need for strict adherence to the "law of the case" doctrine is illustrated by the tortuous course of this litigation. Plaintiff secured all the relief she sought and, therefore, became entitled to an award of attorney's fees as a consequence of the first trial decision entered in August 1978. The U.I.L. filed an appeal and in July 1980, the Fifth Circuit vacated the preliminary injunction for mootness, ruled that Plaintiff was entitled to a fee award as the

prevailing party, and remanded to the trial court for a determination of the appropriate sum of fees. The U.I.L. argued to the Fifth Circuit that Plaintiff was not a prevailing party and that it was entitled to appellate review of the merits by virtue of Plaintiff's pending attorney's fees motion, but the panel rejected these arguments. The U.I.L. reasserted these arguments to the Fifth Circuit in a petition for rehearing en banc and the petition was denied in October 1980. The U.I.L. posed these arguments to this Court in its first application for writ of certiorari, and this Court denied review in June 1981. 451 U.S. 793 (1981).[1] The U.I.L. reasserted these arguments to the trial court on remand, and in the second trial decision, the court ruled that it would not violate "the clear mandate" of the Fifth Circuit by relitigating the merits. The U.I.L. posed these arguments in its second appeal to the Fifth Circuit and the court ruled that, having already decided these questions in the first appeal, the second appeal was controlled by the doctrine of law of the case. The U.I.L. has now returned to this Court with the sole purpose of relitigating the identical issue.

It is speculation as to whether the U.I.L.'s litigation strategy is predicated on changes in the composition of this Court in the interim between the first and second certiorari petitions; on the hope of a different, more receptive circuit court panel on its second appeal; or by a desire to delay payment of Plaintiff's attorney's fees award. It is not speculation, however, that if the U.I.L.'s second certiorari petition was to be granted, other litigants would have incentive to adopt a strategy of never-ending appeals. The result would be to aggravate the burden on the already over-crowded federal court dockets, to subject parties to greater litigation expenses, and to jeopardize the respect accorded to this Court's decisions and those of the lower

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[1]The "argument" section of the U.I.L.'s first petition for writ of certiorari is attached to this brief as an appendix.

federal courts. For all of these reasons, the Court of Appeals correctly ruled that this case should be controlled by the doctrine of law of the case.

II. THE U.I.L.'S PETITION IS IN CONFLICT WITH THE CONGRESSIONAL INTENT UNDERLYING THE ATTORNEY'S FEES AWARDS STATUTES.

Congress enacted attorney's fees statutes with the intent of encouraging private citizens to take the initiative in enforcing basic constitutional and statutory provisions. See Sen. Rep. No. 94-1011, 94th Cong., 2d Sess. at p. 2, 3, 4, 5, 6, reprinted in 5 U.S. Code Cong. & Adm. News, pp. 5909-13 (1976) (hereafter "Sen. Rep."); H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. at p. 1, 2, 3 (hereafter "H.R. Rep."). See also 42 U.S.C. §1988; 29 U.S.C. §794a. Congress recognized, however, that the intended impact of these statutes would be vitiated if losing defendants could successfully delay the payment of fees and thereby impose financial hardships on plaintiffs' attorneys. See Sen. Rep. supra, at p. 5, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912; H.R. Rep. supra, at p. 8. As the Fifth Circuit has noted in recognizing the appropriateness of interim fee awards:

> "There is a danger that litigants will be discouraged from bringing such suits because of the risks of protracted litigation and the extended financial drain represented by such risk. . . . [T]he danger exists that defendants . . . may be tempted to seek victory through an economic war of attrition against the plaintiffs." *James v. Stockham Valves & Fitting Company*, 559 F.2d 310, 358-59 (5th Cir. 1977).

See *Bradley v. Richmond School Board*, 416 U.S. 696, 723 (1974); *Louisville Black Police Etc. v. City of Louisville*, 511 F. Supp. 825, 841-42 (W.D. Ky. 1979).

The public interest in assuring the timelessness of fee awards was noted in an analogous context to that at bar in *Parker v. Lewis*, 670 F.2d 249 (D.C. Cir. 1981). In *Parker*, the trial court entered judgment for the plaintiff in a Title VII suit and the defendants appealed the amount of the fee award. The District of Columbia Circuit summarily affirmed the portion of the fee award that was uncontested and ordered an expedited appeal as to the remaining sum of money. The court set out its rationale as follows:

> "We are concerned that the public policy dictating that attorney's fees be awarded not be completely undercut by routine delays in payment of fees that are properly due and owing. Such delays have the potential to dampen attorney's enthusiasm to undertake discrimination cases. The court should not allow delay in cases such as this one to undermine the efficacy of Title VII Policy." 670 F.2d at 250.

See *Hastings v. Maine-Edwell Central School District*, 676 F.2d 893, 897-98 (2d Cir. 1982).

In the case at bar, the Fifth Circuit ordered an award of fees in its first decision to effectuate the congressional policy of encouraging citizens to weed out discrimination against handicapped persons. Almost five years have elapsed since Plaintiff achieved the primary relief sought and yet the fee award has not been implemented. The U.I.L. is responsible for a meaningful portion of this delay by virtue of a calculated strategy of repeatedly raising legal issues that are barred by the doctrine of law of the case. Its second certiorari petition is the culmination of these tactics. If the U.I.L.'s petition is granted, the precedent will serve as an added incentive for defendants to delay the implementation of fee awards, thereby deterring lawyers from representing civil rights complainants. The U.I.L.'s petition is, therefore, in conflict with the congressional objectives underlying the attorney's fees awards statutes.

III. THE COURT OF APPEALS' FIRST DECISION WAS CORRECTLY DECIDED AND IS CONSISTENT WITH THE PRECEDENT FROM OTHER CIRCUITS.

A. The Court Of Appeals Correctly Determined In Its Initial Opinion That Plaintiff Is The Prevailing Party For Purposes Of An Award Of Attorney's Fees.

A party who successfully sues a state agency pursuant to 42 U.S.C. Section 1983 and Section 504 "... should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Sen. Rep., supra, at p. 4, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912. See *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 416-17 (1978); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Criterion Club v. Board of Commissioners*, 594 F.2d 118, 120 (5th Cir. 1979). See also 42 U.S.C. §1988; 29 U.S.C. §794a.

A plaintiff who, as a result of litigation, has secured or become entitled to the primary relief sought is a "prevailing party" for purposes of an award of attorney's fees. See, e.g., *Coalition for Basic Human Needs v. King*, 691 F.2d 597, 599-602 (1st Cir. 1982); *Bishop v. Committee on Professional Ethics*, 686 F.2d 1278, 1289-91 (8th Cir. 1982); *Williams v. Alioto*, 625 F.2d 845, 847 (9th Cir.), cert. denied, 450 U.S. 1012 (1981); *Bagby v. Beal*, 606 F.2d 411, 414-15 (3d Cir. 1979); *Iranian Students Ass'n v. Edwards*, 604 F.2d 352 (5th Cir. 1979). The courts approach a "prevailing party" analysis by juxtaposing, on a case by case basis, the nature of the relief secured with the objectives of the suit. See *id.* The focus is on the relief received rather than on formal procedural labels. Sen. Rep. at p. 5, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912; H.R. Rep. at p. 7-8. See, e.g., *Maher v. Gagne*, 448 U.S. 122, 129-30 (1980) (party entitled to fees after securing desired

relief through consent decree); *Robinson v. Kimbrough*, 652 F.2d 458, 465-66 (5th Cir. 1981) and *I.S.K.O.N. v. Andersen*, 569 F.2d 1027 (8th Cir. 1978) (parties entitled to fees after securing desired relief through defendants' voluntary cessation of the challenged conduct). See also *Maher v. Gagne*, supra, 448 U.S. at 130 (deference accorded to lower court's finding that plaintiff received the primary relief sought).

The courts have applied these principles to attorney's fees motions predicated on relief achieved through preliminary injunction orders. Where preliminary relief is granted based upon a careful review of the merits and the order has the effect of permanently securing the primary relief sought, the plaintiff is a prevailing party. See *Coalition for Basic Human Needs v. King*, supra, 691 F.2d at 599-602; *Williams v. Alioto*, supra, 625 F.2d at 847-48; *Iranian Students Ass'n v. Edwards*, supra, 604 F.2d at 353; *Kimbrough v. Arkansas Activities Ass'n*, 574 F.2d 423 (8th Cir. 1978); *Howard v. Phelps*, 443 F.Supp. 374 (E.D. La. 1978); *Buckton v. N.C.A.A.*, 436 F.Supp. 1258 (D. Mass. 1977). Where a court grants preliminary relief based on consideration of the merits, but the plaintiff's entitlement to relief over the long term is contingent on the outcome of a trial on the merits or an appeal, a fee motion is premature. See *Doe v. Busbee*, 684 F.2d 1375, 1378-83 (11th Cir. 1982); *Planned Parenthood v. Citizens for Community Action*, 558 F.2d 861, 870-71 (8th Cir. 1977). Where interim relief is entered solely to forestall injury until such time as the court can address the merits, the plaintiff has not secured the ultimate relief sought nor an entitlement to that relief and, therefore, a fee award is not warranted. See *Smith v. Thomas*, 687 F.2d 113 (5th Cir. 1982); *Smith v. University of North Carolina*, 632 F.2d 316, 346-53 (4th Cir. 1980); *Davis v. City of Ennis*, 520 F.Supp. 262, 265-66 (N.D. Tex. 1981) (3 judge court); *Oshiver v. Philadelphia Court of Common Pleas*, 497 F.Supp. 416 (E.D. Pa. 1980). In all of these cases, the result attained, rather than the form of relief, is the determining factor. Implicit in the

holdings is a recognition that, given Congress's desire to encourage lawyers to represent civil rights litigants, it would be contrary to the underlying purpose of the attorney's fees awards statutes to deny fees where a client receives full relief solely due to the means by which the relief was secured. Sen. Rep., supra, at p. 5-6, reprinted in 5 U.S. Code Cong. & Adm. News at p. 5912-13; H.R. Rep., supra, at p. 8. See Note, "Civil Rights Attorney's Fees Awards in Moot Cases," 49 U. Chi. L. Rev. 819, 823-39 (1982) (hereafter "Note, Awards in Moot Cases"). Moreover, if attorney's fees were unavailable where a plaintiff secured relief through a preliminary injunction, defense lawyers could successfully negate the attorney's fees statute by extending and delaying subsequent trial and appellate proceedings in the hope that a case would moot before a final decision on the merits or before exhaustion of the appellate process. See Note, "Awards in Moot Cases," supra, at p. 827.

The U.I.L. argues that this Court's decision in *Hanrahan v. Hampton*, 446 U.S. 754 (1980), precludes an award of attorney's fees predicated on a preliminary injunction order in all circumstances. In *Hanrahan*, the trial court directed a verdict for the state defendants in a civil rights action. The Seventh Circuit reversed, remanded for a new trial, and awarded the plaintiffs' attorney's fees. This Court reversed the award of fees because the plaintiff had yet to prevail on any of their substantive claims. However, the Court emphasized that a final judgment is not a prerequisite to a fee award so long as the plaintiff secures some meaningful measure of the primary relief sought. 446 U.S. at 756-57.

The decision in *Hanrahan* was applied in an identical context to that at bar in *Williams v. Alioto*, supra, 625 F.2d 845. In *Williams*, the plaintiff secured a preliminary injunction against policies of the San Francisco Police Department. The City appealed but, prior to oral argument, it became apparent that the challenged policies would not be

reinstated even if the trial court's decision was reversed. The appellate court dismissed the case as moot, vacated the preliminary injunction, and remanded to the trial court. The trial court granted the plaintiff's motion for a fee award and the city again appealed. Relying on *Hanrahan*, the Ninth Circuit ruled that the preliminary injunction qualified the plaintiff as a "prevailing party" because the trial court had carefully considered the merits and because, as a consequence of the trial court's order, he had permanently secured the primary relief sought. See *Coalition for Basic Human Needs v. King*, supra, 691 F.2d at 599-602 (ordering a fee award predicated on preliminary relief in reliance on *Hanrahan*). See also Note, "Awards in Moot Cases," supra, at p. 824-39.

Plaintiff filed this action to vindicate her son's right to participate in interscholastic football free of discrimination based on handicap. At the time suit was filed, it was apparent to the parties that, given the time parameters, the preliminary injunction motion would dispose of the merits. The trial court addressed the merits and granted Plaintiff a preliminary injunction after an evidentiary hearing that developed all the relevant facts. As a result, John Doe participated in interscholastic athletics until he graduated from high school. In its first appellate decision, the Fifth Circuit ruled that Plaintiff had secured all of the relief sought. In light of this record, Plaintiff is a "prevailing party" under the logic of *Hanrahan* and all the relevant caselaw.

B. The Fifth Circuit, In Its First Decision, Properly Vacated The Preliminary Injunction As Moot And Remanded The Case To The Trial Court For A Determination Of Appropriate Attorney's Fees.

Well before the time of oral argument, John Doe completed his interscholastic athletic career and graduated

from high school. Pursuant to this Court's routine practice and in order to protect the rights of the Defendant U.I.L., the panel vacated the preliminary injunction and remanded to the district court for a determination of appropriate attorney's fees. See *United States v. Munsingwear,* 340 U.S. 36, 39-40 (1950); *Duke Power Company v. Greenwood County,* 299 U.S. 259, 267-68 (1936).

The U.I.L. has repeatedly complained that the award of attorney's fees saves this case from mootness and entitles it to a final judgment on the merits. The U.I.L.'s argument is instructive to the extent that it relies on caselaw which illustrates that many preliminary injunction orders will not be subject to mootness and that a fee award will therefore not be in order until the final disposition at trial or on appeal. See *Planned Parenthood v. Citizens for Community Action,* supra, 558 F.2d at 870-71. However, to the extent that the U.I.L. advocates reincarnating otherwise deceased cases solely because of a motion for fees, its thesis is at odds with the caselaw and the relevant policy concerns. See *Bishop v. Committee on Professional Ethics,* supra, 686 F.2d at 1290-91; *United States v. Ford,* 650 F.2d 1141, 1143 (9th Cir. 1981), cert. denied, sub. nom., *Midwest Growers Cooperative v. United States,* 455 U.S. 942 (1982); *Williams v. Alioto,* supra, 625 F.2d 845; *Bagby v. Beal,* supra, 606 F.2d at 414-15; Note, "Awards in Moot Cases," supra, at p. 824-39. As attorney's fees under the relevant statutes are awarded as a part of costs, the U.I.L.'s theory would mean that once a party prevails in any way in district court and becomes entitled to costs under Rule 54(d) of the Federal Rules of Civil Procedure, the case could never become moot regardless the subsequent events and the loss of an actual controversy. See 42 U.S.C. Section 1988; 29 U.S.C. Section 794(a). See also *White v. New Hampshire Department of Employment Security,* 455 U.S. 445 (1982); *Hutto v. Finney,* 437 U.S. 678, 696-98 (1978). Such a result would impose a serious burden on the already overcrowded docket of this Court. It also runs directly counter to this Court's well-founded aversion to making advisory opinions and to directly addressing important

public policy matters where the facts warrant a more narrow disposition. See *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (Brandeis, J. concurring).

The first appellate decision in this case was a limited one. The court held that where a case becomes moot on appeal from an order granting a preliminary injunction, the fact that the plaintiff is entitled to costs and attorney's fees will not, per se, render the matter justiciable. This holding is particularly appropriate where, as in the case at bar, the inevitability of mootness is readily foreseeable but the defendant chooses not to avail itself of the standard procedures for an expedited appeal. See Rules 5, 8 and 27 of the Federal Rules of Appellate Procedure; Internal Operating Procedures Manual of the United States Court of Appeals for the Fifth Circuit at p. 7. See also *United States v. Munsingwear*, supra, 340 U.S. at 40. Reversal of the decision below would penalize Plaintiff and reward the U.I.L. for the U.I.L.'s failure to conduct this litigation expeditiously. See Note, "Awards in Moot Cases," supra, at p. 827-28.[2]

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[2]The U.I.L. argues that if it is allowed to reopen the merits of the first trial decision, it would demonstrate that Plaintiff's rights under §504 were not violated because he was treated no differently than non-handicapped students. In *Southeastern Community College v. Davis*, 442 U.S. 397, 412-13 (1979), this Court noted that a refusal to modify a program to accommodate a handicapped person would be "discriminatory" where accommodations could be made without imposing undue financial and administrative burdens and where ". . . insistence on continuing past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program." See, e.g., *Dopico v. Goldschmidt*, 687 F.2d 644, 649-53 (2d Cir. 1982); *New Mexico Ass'n for Retarded Citizens v. State of New Mexico*, 678 F.2d 847, 852-55 (10th Cir. 1982); *American Public Transit Ass'n v. Lewis*, 655 F.2d 1272, 1277-78 (D.C. Cir. 1981); *Majors v. Housing Authority*, 652 F.2d 454, 455-57 (5th Cir. 1981); *Tatro v. State of Texas*, 625 F.2d 557, 564 (5th Cir. 1980). In the case at bar, the trial court found in its first ruling that John Doe was a qualified athlete, that he had "a genuine and compelling need to participate in interscholastic football" despite his

We conclude that the first decision of the Court of Appeals was routine and correct, and that it is not of sufficient importance to warrant review by this Court.[3]

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2 continued
handicap and that the U.I.L. could accommodate his needs without suffering any financial detriment or jeopardizing the objectives of its residency rule. Based on these findings, the trial court's finding of liability under §504 is unimpeachable.

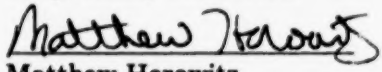
The U.I.L. also argues that §504 is inappropriate because the U.I.L. was not a recipient of federal funds. However, the trial court, in its initial decision, found that the Defendant Alvin School District received federal funds and the Fifth Circuit, in its second decision, noted that "... [t]he evidence also shows that the high school football program itself, participation in which was denied the handicapped boy, was in part directly supported by federal funds." The administrative regulations to §504 reflect that where a nonrecipient of federal funds supervises a federally funded program, the program must be operated in compliance with the statute. 34 C.F.R. §§104.3(f); 104.4(b)(1) and b(4). Separate from the scope of §504, the Supremacy Clause of the United States Constitution, Art. IV, cl. 2, empowers the federal courts to enjoin the acts of state agencies that "... frustrate the purpose of the national legislation...." *Davis v. Elmira Savings Bank*, 161 U.S. 275, 283 (1896). See *Nash v. Florida Industrial Comm'n*, 389 U.S. 235 (1967). Thus, regardless whether the U.I.L. receives federal funds, it must comply with §504 in supervising athletic programs that are recipients.

[3]The U.I.L. argues, in a footnote, that attorney's fees should not be assessed against any of the defendants in their individual capacities. Plaintiff's motion for attorney's fees sought recovery solely from Defendant Marshall in his official capacity as Director of the U.I.L. Though the trial court's second decision does not make this distinction on face, it is clear from the record taken as a whole that that was the trial court's intent.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,



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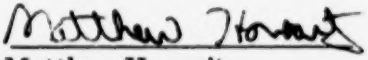
CERTIFICATE OF SERVICE

I certify that on the 16th day of May, 1983, I deposited three (3) copies of this brief in the United States Mail addressed to Ms. Laura Martin, Assistant Attorney General, P.O. Box 12548, Capitol Station, Austin, Texas 78711.



Matthew Horowitz

APPENDIX

REASON FOR GRANTING THE WRIT

From its inception, this case has raised serious jurisdictional issues under Section 504. One fundamental issue is whether the Congress, in enacting Section 504, intended to give private parties such as Jane Doe rights and remedies which they may seek to enforce privately in federal district court. If they have been given any rights and remedies, the question arises as to whether these rights are enforceable privately and to what extent they must be enforced solely or primarily by the Office of Civil Rights of the Department of Health and Human Services. Further, the court below did not decide whether the UIL constituted a "recipient" of federal financial assistance so as to trigger the regulatory provisions of Section 504 or whether, in fact, any discriminating treatment had been administered to John Doe in the UIL's consideration of his case. Certainly these issues should have been resolved before a proper determination could be made as to whether Jane Doe was a "prevailing party" for purposes of attorney's fees.

The court below's decision instead allows Jane Doe to recover attorney's fees solely because she received a preliminary injunction in the trial court which Petitioners argue was entered in error without even determination of the jurisdictional issues.

The question of whether such action should allow Jane Doe to be a "prevailing party" for attorney's fees, as held by the Court of Appeals, is of sufficient importance to merit resolution by this Court.

1. The Court of Appeals erroneously determined that the case was moot.

The Court of Appeals held that because Jane Doe had only sought injunctive relief for her son in the district

court and her son had subsequently finished his final term in school, a justiciable case or controversy no longer existed and a question of attorney's fees would not keep the case alive. Both the UIL and Jane Doe contended that the question of attorney's fees was an issue which could not be properly resolved until a determination on the merits was made by the court, which would, in turn, decide if Jane Doe was a "prevailing party" for purposes of 42 U.S.C. §1988.

On June 2, 1980, this Court entered a per curiam opinion, *Hanrahan v. Hampton*, 48 U.S.L.W. 3780, which addressed the "prevailing party" standard under 42 U.S.C. §1988. At issue was the plaintiffs' entitlement to attorney's fees for overturning several rulings by the district court at the appellate level, to wit: (1) the reversal of the district court's judgment directing verdicts against them; (2) the reversal of the district court's denial of a discovery motion; and (3) the direction to the district court to permit further discovery and hold a hearing on certain matters. This Court held that since plaintiffs had not prevailed on the merits of any of their claims, they were not entitled to attorney's fees. The basis of the opinion rested on the Court's interpretation of the legislative history of the Civil Rights Attorney's Fees Award Act of 1976:

> . . . it seems clearly to have been the intent of Congress to permit . . . an interlocutory award only to a party who established his entitlement to some relief on the merits of his claims, either in the trial court or on appeal. *Id.*, at 3781.

Under this standard, Jane Doe would not be entitled to attorney's fees. The Fourth Circuit recently issued a decision analogous to the present case. In *Smith v. University of North Carolina*, ____ F.2d ____ (4th Cir., Sept. 30, 1980), a claimant had succeeded in obtaining a preliminary injunction to prevent her discharge pending a decision on the merits, but the district court had ultimately found no merit in any of her discrimination claims. The court, citing

Hanrahan v. Hampton, supra, ruled that the plaintiff was not a prevailing party for purposes of an attorney's fee award.

In *Grubbs v. Butz,* 548 F.2d 973 (D.C. Cir. 1976), *cited with approval* in *Hanrahan v. Hampton, supra,* at 3781, n.4, the court held that a plaintiff in a Title VII lawsuit who succeeded on one issue in an interlocutory appeal (concerning the necessity of exhaustion of adminstrative remedies) was not thereby eligible for an award of attorney's fees because she hadn't yet demonstrated discrimination. The court found that:

> For all we know, the Defendants in this case may be entirely blameless. If attorney's fees were assessed against them at this point in the litigation, the ultimately successful party might end up having subsidized a large segment of the losing party's suit against him. *Id.* at 976.

Hildebrand v. Board of Trustees of Michigan State University, 607 F.2d 705 (6th Cir. 1979, *per curiam*), found that while the plaintiff was correct that his civil rights suit should not have to pay for attorney's fees on the basis of a plaintiff's purely procedural victory. In *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978), *cited with approval* in *Hanrahan v. Hampton, supra,* at 3781, n.4, the circuit court held that a party is "prevailing" for purposes of an attorney's fee award if he succeeds on any significant issue in litigation which achieves some benefit the parties sought in bringing suit. Since the plaintiffs in *Nadeau* prevailed on the issue of access to the prison library, they were entitled to attorney's fees.

In view of these holdings, Jane Doe is not entitled to award of attorney's fees at this time. The only relief the district court granted was injunctive — a procedural victory for Jane Doe at most. No finding has ever been made by the courts that John Doe, Jane Doe's son, was ever

discriminated against by Petitioners, that he was treated differently from any student falling under the provisions of the UIL's rules.

Furthermore, serious jurisdictional questions have still not been resolved by the courts below: whether Section 504 creates a private cause of action for private parties; whether the UIL is a recipient of federal funds which would trigger jurisdiction for the courts to decide the case; and whether 42 U.S.C. §1988 provides for an award of attorney's fees in a Section 504 case. Petitioners assert that were the courts to answer these questions, Petitioners would prevail in this lawsuit.[1] No significant issue raised by Jane Doe has been resolved in her favor. Therefore, at this time, an award of attorney's fees is improper under 42 U.S.C. §1983 and §1988. Clearly, the merits of this case must be decided before an award of attorney's fees can be made. Further, because attorney's fees will be contingent upon the determinations made on these issues, the court below was in error in its determination that the case is moot.

This critical question should be decided by this court to prevent Petitioners from being subjected to possible attorney's fees without ever having a determination made as to whether they are warranted.

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[1]This Court has presently granted certiorari in the case of *The University of Texas, et al., v. Walter Camenisch*, No. 80-317, to determine whether a private cause of action was created by Section 504. Petitioners have also argued that a showing of bad faith or obstreperous conduct must be made to justify attorney's fees under 42 U.S.C. §1983; and require that 42 U.S.C. §1988 does not provide for an award of attorney's fees under a Section 504 case. Petitioners would respectfully direct the Court's attention to Petitioners' arguments and cases cited in this petition and brief.

2. **If the case is moot, the proper cause of action would be for the Court of Appeals to set aside the decision below.**

Furthermore, the general rule governing dismissal for mootness by an appellate court is to accompany such order of dismissal with an order vacating the judgment below and to remand with directions to dismiss the case. *United States v. Munsingwear,* 304 U.S. 36 (1950); *Diffenderfer v. Central Baptist Church,* 404 U.S. 412 (1972); *Board of Regents of the University of Texas v. New Left Education Project,* 414 U.S. 807 (1974); reversing *New Left Education Project v. Board of Regents,* 472 F.2d 218 (5th Cir. 1973); *University of Texas Systems v. Assaf,* 435 U.S. 992 (1978), reversing *Assaf v. University of Texas System,* 399 F.Supp. 1245 (D.C. Tex.) *Duke Power Company v. Greenwood County;* 299 U.S. 259 (1936); *Troy State University v. Dicket,* 402 F.2d 515 (5th Cir. 1968); *Lebus v. Seafarer's International Union,* 398 F.2d 218 (5th Cir. 1968).

The application of the general rule, vacation of the judgment upon dismissal of an appeal for mootness, is not dependent upon the reason that the case had become moot. The rule applies whether a case becomes moot through happenstance or because of the actions of one of the parties. *Board of Regents v. New Left Education Project, supra; Diffenderfer v. Central Baptist Church, supra; Hall v. Beals,* 396 U.S. 45 (1969).

The logic and philosophy behind the rule requiring the vacation of the judgment of the lower court is to prevent legal consequences, either by precedental effect or res judicata, from arising from a judgment which was rendered unreviewable because of mootness. *United States v. Munsingwear, supra; Troy State University v. Dickey, supra, Lebus v. Seafarer's International Union, supra.*

The dangers in this case are even more apparent and immediate. Petitioners, without having the issue of the appropriateness of the judgment below determined, have

been subjected to a possible judgment for attorney's fees in the amount of $11,373.75.

Moreover, other dangers to Petitioners are very real in this case. Without a final appellate determination as to whether the challenged UIL rule was actually unconstitutional, the UIL is faced with a court decision, which cannot be challenged and which in effect holds a UIL rule invalid. The only possible challenge would be to ignore the trial court decision, thus generating another suit wherein the UIL could again argue the merits of the UIL rule in question.

In such a case, a precedential effect of the decision of the lower court will obviously weigh against the UIL and the UIL will be handicapped in asserting a good faith defense to a prayer for damages.

The court below cited numerous cases in an apparent attempt to extinguish these fears. Petitioners submit, however, that these cases are distinguishable from the case at bar.

Plaintiffs in *Iranian Students Association v. Edwards*, 604 F.2d 352 (5th Cir. 1979), obtained a preliminary injunction *and* a consent decree against the rule which prohibited the activity of plaintiffs that precipitated the legal proceeding. In the case at bar, Jane Doe obtained a preliminary injunction, but there has been no adjudication either by consent or otherwise that the University Interscholastic League rule is invalid. The UIL rule is still in effect and is being enforced by UIL. Therefore, reliance upon *Iranian Students Association v. Edwards* as authority for awarding attorneys fees in this case is inappropriate. Likewise, in *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979), the challenged statute was declared unconstitutional by the district court and during the pendency of the appeal, the Mississippi legislature amended the statute to eliminate the challenged provision. Here again,

the plaintiff was successful in eliminating the challenged statutory provision. In the case at bar, this has not happened.

All of the "prevailing party" cases cited in the decision of the court below fall into the same category, i.e., the challenged rule or statute was changed so that the offending feature was removed. In that context, the plaintiffs were the "prevailing party." In the same context, Jane Doe in the case at bar is not the "prevailing party" because the UIL rule that was challenged is still intact and being enforced.

In the case now before Court, Petitioners would argue that this Court should consider the court below's position as to mootness and should conform the law of the circuit to the decisions of this court in *University of Texas System, et al. v. Dr. Said A. Assaf, and Board of Regents v. New Left Education Project.*

CONCLUSION

The Petition for Writ of Certiorari should be granted for the reasons set out above.

Respectfully submitted,

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